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Human rights situation in Palestine and other occupied Arab territories

Written statement* submitted by United Nations Watch, a non-governmental organization in special consultative status

The Secretary-General has received the following written statement, which is hereby circulated in accordance with Economic and Social Council resolution 1996/31.

[2 February 2018]

* This written statement is issued, unedited, in the language(s) received from the submitting non-governmental organization(s).

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Why the Blacklist Violates UN Principles and International Law

In Resolution 31/36, sponsored by Kuwait for the Arab Group, Pakistan for the Organization of Islamic Cooperation, Sudan, the Bolivarian Republic of Venezuela, Algeria, Bahrain, the Plurinational State of Bolivia, Chad, Cuba, Djibouti, Ecuador, Egypt, and Libya, the Human Rights Council (HRC) requested the High Commissioner for Human Rights to produce a database of all businesses that "directly and indirectly, enabled, facilitated and profited from the construction and growth of the settlements."

The goal of the database is to pressure Israel to withdraw from the settlements—a move which according to the Oslo Accords should be taken only in the context of final status negotiations.

Even those opposed to settlements have reason to strongly object to the discriminatory blacklist, including on the following grounds.

1. Violates UN Principles of Equality and Non-Discrimination

The United Nations Charter states that the UN "is based on the principle of sovereign equality of all its members."1 Likewise, the founding principles of the HRC include "ensuring universality, objectivity and non-selectivity in the consideration of human rights issues, and the elimination of double standards and politicization."2 Against the founding principles of the HRC, the blacklist is designed to further the discriminatory BDS campaign which seeks to advance the Palestinian political agenda by delegitimizing Israel.

There are more than 100 disputed territories around the world, many involving occupations and settlements. Yet in no other case has the UN lobbied for the creation of a database of companies operating in the contested territory.

Western Sahara and Northern Cyprus are prime examples of this double standard.

Morocco occupied Western Sahara in 1974. Although the Security Council considers the territory occupied, Morocco has established significant settlements there, which the EU supports in the following ways:3

- The EU pays Morocco €40 million per year for the right to fish in Morocco's waters, expressly including Western Sahara.
- The EU provides Morocco with hundreds of millions of Euros in foreign aid without any restriction that the funds not be used in Western Sahara.

Turkey occupied Northern Cyprus in 1974. Although, the Security Council considers Turkish control illegal, Turkey established settlements which the EU actively supports in the following ways:4

- Turkey established universities in the territory, many of which are branches of mainland Turkish universities and have joint programs with major British institutions.
- The EU directly funds Turkish Cypriots, including settlers, at a rate of €28 million per year in the form of, *inter alia*, student scholarships and technical assistance to businesses.
- The EU helps Turkish settlers exploit natural resources in Northern Cyprus.

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1 UN Charter, Article 2.

2 A/Res/60/251.

3 Eugene Kontorovich, "Economic Dealings with Occupied Territories," *Columbia Journal of Transnational Law* 53, 584-637, pp. 600-08, 2015.

4 *Id.*, p. 615-21

UN silence on business activity in these occupied territories shows that the blacklist is not about human rights. Some have objected to the term "blacklist," claiming the settlements database is merely about corporate transparency.5 If that were the case, however, it would not be limited to Israel.

2. Business in Settlements is not Illegal

The above examples demonstrate that there is no international law prohibition against business in settlements. In fact, Article 43 of the 1907 Hague Convention obligates the occupying power to "restore and ensure, as far as possible, public order and safety." This is understood to permit the occupying power to build infrastructure, including roads, sanitation, communications and security.6 Similarly, the Fourth Geneva Convention authorizes an occupying power to do business in territory it controls.7

These principles have been confirmed in several legal rulings, including:

- A 2002 memo by the UN's own legal advisor addressing the case of Western Sahara.8
- A 2013 ruling by the French Court of Appeals in Versailles confirming that the Geneva Conventions do not bar private economic activity in settlements.9
- A 2014 ruling by another French court that settlement products and their manufacture are not illegal.10
- A 2014 ruling by the UK Supreme Court that the sale of settlement products does not aid international law violations.11

3. The Guiding Principles on Business and Human Rights do not Advocate Blacklists

Significantly, violation of Palestinian human rights is not a condition for inclusion on the blacklist. Pro-Palestinian groups claim this is because "abuses are inherent to the settlement enterprise."12 However, such a blanket prohibition on doing business with occupied territories is not supported by state practice, international law or the Guiding Principles on Business and Human Rights.

In fact, the Guiding Principles expressly envision the continued operation of businesses in areas affected by conflict. They merely call on businesses to conduct due diligence to assess the human rights impact of their activities with the aim of maintaining operations while implementing measures to protect human rights.13

Significantly, the burden to conduct due diligence is on the business itself, not on third parties like the U.N. The Guiding Principles suggest that a business can "consider" withdrawing from a conflict-area in the limited circumstance where it determines it is not able to protect human rights. Again, this is framed as an internal business decision. Even then, the business must examine the "adverse human rights impact" of withdrawing.14

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5 "Joint NGO Statement in Support of the UN Human Rights Database on Business Activities related to Settlements in the Occupied Palestinian Territory," *Amnesty International*, Nov. 30, 2017.

6 "Submission of the Institute of NGO Research, Position Paper Regarding Preparation of a Discriminatory Blacklist Pursuant to UNHRC Resolution 31/36," *NGO Monitor*, Jan. 2, 2017.

7 "Who Else Profits: The Scope of European and Multinational Business in Occupied Territories," *Kohelet Policy Forum*, June 2017.

8 Kontorovich, pp. 602-03.

9 *Id.*, p. 633.

10 *Id.*, p. 634.

11 *Id.*, pp. 631-33.

12 "Israel/Palestine: UN Settlement Business Data Can Stem Abuses, *Human Rights Watch*, Nov. 28, 2017; *see also* "Palestinian Organizations Support Release of UN Database Report and Call for Third State Action to End Corporate Complicity in Occupation," *Al-Haq*, January 2018.

13 Guiding Principles on Business and Human Rights, Principles 7; 17-19.

14 *Id.* at Principle 19.

In the case of the settlements, both Israelis and Palestinians may be adversely impacted by withdrawal of business. The Guiding Principles do not mention or promote the creation of a database of businesses operating in conflict areas. Likewise, the Working Group on Business and Human Rights' statement on Israel accepts that businesses are entitled to operate in occupied territories and does not advocate a blacklist.15

4. Violation of Due Process

The only published criteria for inclusion on the blacklist is the vague and overbroad language of paragraph 96 of the HRC's Report on Settlements.16 The referenced activities (construction, security services, utilities, banking, etc.) are deemed problematic because they "raise particular human rights violations concerns," without specifying how or why. In his January 26, 2018 report, the High Commissioner admitted that the selection criteria is not based on human rights violations, but on involvement in listed activities irrespective of the human rights impact.17

5. HRC is not Authorized to Impose Sanctions

Pursuant to Article 41 of the UN Charter, the Security Council is exclusively authorized to impose sanctions on a Member State. The HRC has no such authority. While some have argued that the blacklist itself is not a sanction,18 Resolution 31/36 expressly references Paragraph 117 of the February 2013 report of the Fact-Finding Mission on Settlements,19 recommending that private companies "terminat[e] their business interests in the settlements." This follows the call in Paragraph 12 for Israel to "immediately initiate a process of withdrawal of all settlers from the Occupied Palestinian Territory." Therefore, it is clear that the goal is to economically pressure Israel to withdraw from settlements. Moreover, at least one Palestinian official expressed hope that the blacklist would lead to sanctions.20

6. Promotes Violation of the Oslo Accords

Article 31 of the 1995 Interim Agreement reserves a number of important issues for permanent status negotiations, including settlements and borders.21 Pressuring Israel to unilaterally withdraw from settlements contravenes this provision.

7. Impairs Israel's Right to Self-Defense

Israel's "inherent right of individual or collective self-defense" under international law is affirmed by Article 51 of the U.N. Charter. Terrorist attacks against Israel trigger this right. Yet the blacklist targets Israel's security and self-defense infrastructure, thereby undermining its ability to protect its citizens. Furthermore, by including on the blacklist companies that provide security to Israeli settlements, the UNHRC implicitly legitimizes violence and murder against Israeli civilians beyond the green line—clear violations of international law.

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15 "Statement on the implications of the Guiding Principles on Business and Human Rights in the contect of Israeli settlements in the Occupied Palestinian Territory," *Working Group on the issue of human rights and transnational corporations and other business enterprises*," June 6, 2014. We note that the Working Group has not issued a similar statement with respect to any other occupied territory.

16 http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session31/Pages/DatabaseHRC3136.aspx.

17 A/HRC/37/39, Report of the High Commissioner pursuant to Resolution 31/36, Jan. 26, 2018, ¶ 9.

18 Valentina Azarova, "Why the UN is setting up a database of international businesses operating in Israeli settlements," *The Conversation*, Dec. 8, 2017.

19 A/HRC/22/63.

20 "Israel races to head off UN Settlement 'blacklist,'" *Ynet*, Nov. 26, 2017 (quoting Nabil Shaath).

21 "Israel-Palestinian Interim Agreement on the West Bank and the Gaza Strip," Sep. 28, 1995.